Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

In the
Supreme Court of the United States

OCTOBER TERM, 1975

NO. 75-1855

ROSS CATES, INDIVIDUALLY, AND AS NATURAL TUTOR OF HIS MINOR SON, LARRY G. CATES,

Petitioner

versus

BEAUREGARD ELECTRIC COOPERATIVE, INC. and CECIL RIBBECK,

Respondents

SUPPLEMENTAL ADDENDUM TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

JOHN J. CUMMINGS, III
200 Alison House
416 Gravier Street
New Orleans, Louisiana 70130

Attorney for Petitioner

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-3555

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DISSENTING OPINION

NO. 5061

COURT OF APPEAL, THIRD CIRCUIT

STATE OF LOUISIANA

ROSS CATES, INDIVIDUALLY,
ETC.

Plaintiff-Appallant

vs.

BEAUREGARD ELECTRIC COOPERATIVE, INC.,
ET AL

Defendants-Appellees

Appeal from the Fourteenth Judicial District Court in and for the Parish of Calcasieu, State of Louisiana; Honorable Earl E.Veron, Judge, presiding.

WATSON, J., dissenting:

I cannot agree with the majority opinion which affirms a summary judgment in favor of defendants on the basis of contributory negligence.

Contributory Negligence

First, I do not agree that the question of contributory negligence can be properly decided on a motion for summary judgment.

> "...existence vel non of contributory negligence is a question of fact, and...the arbiter of such fact is judge or jury." Odom v. Hooper. 273 So. 2d 510 at 514, 515 (La., 1973).

Odom v. Hooper is particularly apropos since it involves a summary judgment granted on a finding that plaintiff was guilty of contributory negligence as a matter of law. The Court of Appeal affirmed the summary judgment and the Supreme Court reversed, stating:

> "Only a trial on the merits will reveal the true facts of an accident; in other words, plaintiff and defendant must have their day in court." 273 So. 2d 515

On the question of whether "reasonableness" is a question of law or fact, Odom v. Hooper bluntly says:

> "The reasonableness and prudence of the deceased is a factual matter and must be tried on the merits of the case."
> 273 So. 2d 515

The majority opinion paraphrases Dean Prosser to the effect that the test of reasonableness, as a question of fact or law, is whether reasonable minds could differ in the conclusion to be drawn. (Does this beg the question?) I note that Dean Prosser was speaking of proof of negligence, not

contributory negligence and that he adds, later in his treatise, the following:

> "The result of all this is that, while the theory is the same, and the formula put to the jury is the same, the practical application of both is not the same for negligence and for contributory negligence. As to the latter, in part because of these differentiating factors, and in part, perhaps, because of the healthy dislike and distaste which nearly all courts have developed for this defense, the marked tendency has been to let the issue go to the jury whenever it is at all possible." [1]

Therefore, I conclude that the general rule in Louisiana, as announced by the Supreme Court in 1973, is that contributory negligence and "reasonableness" are factual questions to be decided by trial on the merits.

Also, the case before us concerns not a reasonable man, but a reasonable 16-year-old boy who, I submit, might be much more likely to clumb a tree or an abandoned pole to collect scrap wire for his school. While a 16-year-old boy may be contributorily

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[1] Prosser, Law of Torts, 4th Ed., § 65, p. 420.

negligent, he is not held to the same "...degree of prescience, caution and intelligence of an adult," Shally v. N.O. Public Service,Etc., Board, 1 La. App. 770 at 777; affirmed 159 La. 519, 105 So. 606.

Status of the Boy

Second, the issue of the boy's status as to: (a) the electric company; and (b) the landowner, involves questions of both fact and law.

The proposed review cites Tooraen v. New Orleans Public Service, Inc., 243 So. 2d 312 (La. App. 4 Cir. 1971) which held that a 14-year-old boy who clumbed a seven-foot chain link fence with three strands of barbed wire at the top, embellished with signs reading "Danger High Voltage", and who then climbed a structure inside the fence some 20 feet high was contributorily negligent and could not take advantage of the attractive nuisance doctrine. The instant case, where a youth climbed what may have appeared to him to be an abandoned electric pole, with only one wire still strung and two or three wires dangling down the pole, adjacent to an abandoned farmhouse, presents a considerably different situation factually from Tooraen.

It is significant that Tooraen, on which the majority relies heavily, was not a summary judgment case, but was a review of a case tried on the merits.

The other case on which the majority relies is the 1915 decision of Lapouyade v. New Orleans Railway & Light Company, 138 La. 237, 70 So. 110, which involved not an abandoned pole but a pole on a public street. I note that Justice O'Niell dissented in Lapouyade and I suggest the case does not represent current legal thought.

I think there is serious question as to whether young Cates was a trespasser as the majority concludes.

I am not certain that the majority considers the difference in status that the boy had as to the power company and the landowner. Can the power company claim he was a trespasser as to an abandoned pole located on someone else's property? Does the trespasser theory under the cases cited by the majority relate to abandoned poles and wires still charged with high voltage? Cf. Langazo v. San Joaquin Light & Power Corporation, 90 P.2d 825, 32 Cal. App. 2d 678 (1939).

In summary, I think it is far from clear that defendants are entitled to summary judgment. Any doubt as to summary judgment is to be resolved in favor of trial on the merits. Moreaux v. American Mutual Insurance Co., 302 So. 2d 686 (La. App. 3 Cir. 1974); Vidrine v. White, 306 So. 2d 465 (La. App. 3 Cir. 1975); writ granted 309 So. 2d 679. The plaintiff may have only a

slim chance on the merits, but this Court must not overlook the fact that we are not deciding (or even reviewing) the merits. Summary judgment is not to substitute for trial.

I respectfully suggest that the majority makes a serious mistake in approving a summary judgment in not just a negligence case, but in a contributory negligence case.

For these reasons, I dissent.

Supreme Court of Louisiana

NEW ORLEANS, 70112

FOR IMMEDIATE NEWS RELEASE

FROM: CLERK OF SUPREME COURT OF LOUISIANA

On the 26th day of March, 1976, the following action was taken by the Supreme Court of Louisiana in the cases listed below:

REHEARINGS GRANTED:

56,909 Jackson, etc. v. D'Aubin

56,920 Billiot, etc. v. Bourg

56,872 State v. McNeal

56,812 State v. Glover
56,894 " "

REHEARINGS REFUSED:

56,186 State v. Newton (On Rehearing)
56,187 State v. Leslie Newton "
56,188 State v. Palmer "
56,189 State v. Bonner "
56,190 State v. Lizzie Jones "
56,191 State v. Sentell Jones "
56,192 State v. Flora Bell Harris "
56,193 State v. Vera Lee Harris "
56,194 State v. Reavers "
56,195 State v. Sloan "
56,196 State v. Kirts "
TATE, DIXON and CALOGERO, J. J., are of the opinion that a rehearing should be granted.

56,673 State ex rel Guste v. Simoni, Heck
SUMMERS, J., is of the opinion that a rehearing should be granted.

56,977 State v. Lewis

56,949 Cates, etc. v. Beauregard Elec. et al
TATE and CALOGERO, J. J., are of the opinion that a rehearing should be granted.

56,994 State v. O'Neal

56,954 Parras, et al v. LPSC

57,036 State v. Boleyn
SANDERS, C. J., SUMMERS and MARCUS, J. J., are of the opinion that a rehearing should be granted.

56,996 State v. Credeur

CERTIFICATE OF SERVICE

I CERTIFY that a copy of the foregoing Supplemental Addendum has been served on opposing counsel of record, Carl H. Hanchey of Jones, Kimball, Patin, Harper, Tete & Wetherill, Gulf National Bank Bldg., Lake Charles, Louisiana 70601 and L. E. Hawsey,III, P. O. Box 532, Franklin, Louisiana 70538, by depositing same in the U.S. mail, postage prepaid, this 2nd day of July, 1976.

JOHN J. CUMMINGS,III